

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1360

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

IVAN GOLDMAN and RUDY LEWIS,
Defendants-Appellants.

*Appeal from Judgment of Conviction, United States District
Court for the Southern District of New York at Criminal
Number 77-97.*

**BRIEF FOR APPELLANT
RUDY LEWIS**

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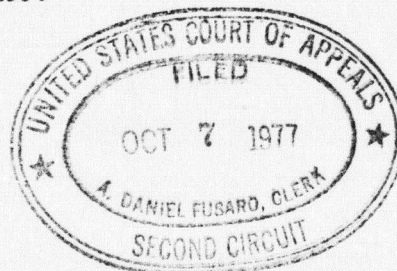


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STATEMENT OF JURISDICTION

Counsel for appellant certifies that the present appeal is from the Order of Judgment and Commitment and constitutes a final judgment in accordance with Title 28 U.S.C., §291 which reads in pertinent part, as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States..."

SCOPE OF REVIEW

The scope of this Court's review on the first issue is whether the trial court committed reversible error by instructing the jury that in evaluating the appellant's credibility it should consider that interest in the verdict is a motive for falsely testifying and that the appellant's interest in the verdict was greater than that of any other witnesses.

The scope of review on the second issue is whether the trial court committed reversible error in its supplemental charge to the jury relating to further deliberations.

STATEMENT OF ISSUES

1. Did the trial court commit reversible error by instructing the jury that interest in the verdict creates a motive for falsely testifying and that the defendant's interest in the result of the trial is of a character possessed by no other witness?

2. Did the trial court commit reversible error in its supplemental charge to the jury relating to further deliberations?

STATEMENT OF THE CASE

The appellant was charged with a co-defendant, with one count of conspiracy to transport in interstate commerce goods of a value in excess of Five Thousand Dollars (\$5,000) knowing the same to have been stolen in violation of Title 18 USC §371 and by himself with four substantive counts of transporting in interstate commerce said goods in violation of Title 18 USC §2314 which reads in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the value of Five Thousand Dollars (\$5,000) or more, knowing the same to have been stolen, converted or taken by fraud...

The presentation of evidence consumed approximately two days and was quite devoid of either complex issues of law and fact. As stated by the trial judge:

The evidence established that goods were sent from Guilford Mills to a processor, Cranston Print Works in Fletcher, North Carolina. The evidence established that thereafter the goods were released and sent to a wholesaler in New York by the name of Bayer-Eisneberg. The evidence also established that Guilford Mills never got paid for these shipments. The issue is whether Ivan Goldman and Rudy Lewis took money from Michael Cohen in payment for fabric belonging to Guilford Mills and intercepted the bills of lading at the New York Office so that Guilford would not know that Bayer Eisenberg owed it for these particular goods (App. 14a-15a).

The conspiracy count was dismissed and the appellant was found guilty on the four substantive counts. The trial judge sentenced the appellant to one year imprisonment on each of the counts

on which he was convicted with the terms to run concurrently.

ARGUMENT

- I. THE COURT PREJUDICED THE APPELLANT BY INSTRUCTING THE JURY THAT INTEREST IN THE VERDICT CREATES A MOTIVE FOR FALSELY TESTIFYING AND THAT THE DEFENDANT'S INTEREST IN THE RESULT OF THE TRIAL IS OF A CHARACTER POSSESSED BY NO OTHER WITNESS

The trial judge instructed the jury on the determination of credibility in the following manner:

In appraising the credibility of all witnesses you take into account the interest of the witness, the motives and other factors that may reasonably be considered as influencing or coloring that person's testimony. The fact that a person is interested, however, does not necessarily mean that his testimony is not true. It is merely one factor that you have to consider in evaluating the testimony, because you have to consider in evaluating the testimony because you as the jurors are the sole judge of the credibility of the witnesses and the weight their testimony deserves.

The law permits, but does not require a defendant to take the stand in his own behalf. In this case, the defendant Rudy Lewis took the stand. Obviously, the defendant has a deep personal interest in the result of this prosecution. Indeed, it is fair to say that a defendant has the greater stake in the outcome of the trial. Interest, as you know, creates a motive for false testifying. The greater the interest, the stronger the motive, and a defendant's interest in the result of a trial is of a character possessed by no other witness.

In appraising that defendant's credibility, you may take his interest in the outcome into consideration. (App. 12a).

The trial judge's direct reference to the testimony of the defendant was by itself gratuitous and potentially prejudicial. When, however, the court went further and unequivocally instructed the jury that the stronger the interest in the verdict, the greater the motive

for falsely testifying the defendant was irreparably prejudiced. The prejudice could not be cured by the court's additional following instructions:

However, it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful and straightforward story. It is for you to decide to what extent, if at all, his interest has colored his testimony. (App. 13a).

The specific language which the appellant contends is fundamentally prejudicial in the context of a different trial might be deemed erroneous but not of such a degree as to have prevented a defendant from obtaining a fair trial. United States v. Howard, 433 F2d 505 (C.A.D.C., 1970). Taylor vs. United States, 390 F2d 278 (8th Cir., 1968). In the instant case, however, such a position is not tenable. The trial was short and the issues uncomplicated. The trial judge himself stated in his charge to the jury the following:

I have just given you a rather lengthy charge and it may sound a little bit confusing to you; but in reality this is a very simple case. The evidence established that goods were sent from Guilford Mills to a processor, Cranston Print Works in Fletcher, North Carolina. The evidence established that thereafter the goods were released and sent to a wholesaler in New York by the name of Bayer-Eisenberg. The evidence also established that Guilford Mills never got paid for these shipments. The issue is whether Ivan Goldman and Rudy Lewis took money from Michael Cohen in payment for fabric belonging to Guilford Mills and intercepted the bills of lading at the New York office so that Guilford would not know that Bayer Eisenberg owed it for these particular goods. (emphasis added) (App. 14a-15a)

The court thus instructed the jury that the only issue in the case was whether "Rudy Lewis took money..." which was unequivocally denied by the appellant. (App. 11a).

In an apposite case, Hicks v. United States, 150 U.S. 442 (1893) the Supreme Court held that instructions less prejudicial than those to which the appellant objects amounted to reversible error. The Court stated:

The learned judge further, in this instruction, argued to that jury that, in considering the personal testimony of the accused, they should consider "his interest in this case." "You are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest consequently as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore, it is but right and it is but your duty to review the statements of such a witness in the light of his attitude, and in the light of the other evidence.

It is not easy to say what effect this instruction had upon the jury.... Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that "the person charged shall, at his own request, but not otherwise, be a competent witness." The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law. (at pages 451, 452).

Under the facts of this case, with the trial of short duration and the court advising the jury that there is only one simple issue to decide, the instructions constituted reversible error.

ARGUMENT

II. THE COURT ERRED IN ITS SUPPLEMENTAL CHARGE TO THE JURY RELATING TO FURTHER DELIBERATIONS.

The introduction of evidence and the presentations of the cases of the Government and both defendants consumed approximately two days of court time (App. 18a).

(a) After approximately seven to eight hours of deliberations (App. 16a; 18a) the court sua sponte called the jury and instructed:

Ladies and gentlemen, it's quite late in the evening and you have had a long day. Unless you feel that with a short period of further deliberations you might reach a verdict, I would suggest that the wise thing to do would be to put you all in limousines, send you home for the evening and have you come back Monday morning. If you wish, you can go back and discuss what you want to do. If you feel that you know what you want to do, you can tell me now. (App. 17a).

Shortly thereafter, the jury returned with a vote which read:

Your honor, we, the jury, have been unable to reach a decision and we have agreed that it is unlikely we will be able to even with further deliberation. (App. 17a).

Counsel for the co-defendant, then advised the court that based upon the evidence in the case and the short duration of the trial that a further charge from the court would not be beneficial in obtaining a verdict.

We have a very intelligent jury and they obviously are deeply divided and further deliberation will not help. Based upon that, Your Honor, I would ask for a hung jury.

Counsel for the appellant stated that his position was similar to that of the co-defendant's and that

Any further deliberations would really serve no useful purpose... (App. 12a-14a).

At this time the court sent the jury home and instructed it to return the following Monday morning when the court instructed inter alia:

It certainly is not the law that each juror should not listen with deference to arguments and with a distrust of his own views, his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. (emphasis added) (App. 21a).

The court continued and charged:

...The considerable costs in money and time to both sides if a retrial is necessary suggests that if it is possible for you jurors to reach a unanimous verdict without any juror yielding a conscientious conviction you should do so. Our law requires a retrial unless the jury is unanimous and there is no reason to suppose that any other jury is going to be of better quality and decide it differently from you. (emphasis added) (App. 22a).

Subsequently that day the jury returned a verdict of guilty as to the defendant on Counts 5, 6, 7 and 8 of the Indictment.

United States v. Bermudez, 526 F2d 89 (2nd Cir., 1975) wherein this Court approved instructions somewhat similar to that

used by the District Court in the case at bar, is distinguishable for several reasons. Unlike the present case, the issues of law and fact therein were much more complicated and the trial was of greater duration than the one at bar.

More importantly, the trial judge in the instant case, in his original instructions charged the jury in the following manner:

I have just given you a rather lengthy charge and it may sound a little bit confusing to you; but in reality this is a very simple case. (emphasis added) (App. 14a).

The fact that the trial was of very short duration; that the trial judge explicitly stated that the case was "simple" and that there is "...no reason to suppose that any other jury is going to be of better quality and decide it differently from you," cumulatively tended to belittle both the efforts and intelligence of the jury and was thus inherently coercive and tainted the verdict.

Although this Court has approved use of the Allen charge, the trial judge in the instant case went beyond the permissible limits of the Allen charge. As indicated supra the trial judge not only instructed that the jurors listen with deference to the arguments of the other members of the jury but also that is should listen "...with a distrust of his own views." (emphasis added) (App. 21a).

The term "distrust" is so emotionally laden and so pregnant with the implication that a juror should in fact, change his mind and yield to the opinion of the majority that the average

juror, hearing these words from the judge in all likelihood would do so. The countervailing language that "...no juror is expected to yield the conscientious conviction he or she may have..." does not cure the error. The trial judge should not be allowed to instruct a juror to "distrust" his judgment but merely to consider that his doubt is a "reasonable one."

In Fulwood v. United States, 369 F2d 960 (C.A.D.C., 1966), the instruction that a juror should "distrust his judgment" upon finding a different view by the large majority was a critical factor in the reversal of the conviction.

In United States v. Taylor, 530 F2d 49 (5th Cir., 1976), the court stated:

Consequently, any variation from the classic Allen language will be subject to intense scrutiny. United States v. Cheramie, 520 F2d 325, 300 (1975); United States v. Amaya, 509 F2d 8, 12-13 (5th Cir., 1975). A charge will only survive this scrutiny if after examining the facts and circumstances, the court is convinced that the charge will not coerce the jury. United States v. Taylor, 513 F2d 70, 72 (5th Cir., 1975). United States v. Cheramie, 520 F2d 325, 328 (5th Cir., 1975). (at page 51.)

Two of the three circumstances causing a reversal in Taylor infra, exist in the case at bar - the Court's comments about the expense and inconvenience of a retrial and the fact that the case was "simple."

The Court in Taylor stated:

By repeating it here, he suggests that the Taylor case is an easy one. Thus, if the minority was holding out for the defendant in this case, they might be more easily persuaded to change their positions if they thought the defendant was probably guilty

but were not convinced beyond a reasonable doubt. Third, the trial judge strongly emphasized to the jury that another trial would involve enormous expense and inconvenience. These statements could scarcely have avoided creating the impression that there might be something "improper, questionable, or contrary to a good conscience for a juror to cause a mistrial..." Thaggard v. United States, 354 F2d 735, 739 (5th Cir., 1965), cert. denied, 383 U.S. 958, 86 S.Ct. 1222 354, F2d 735 (1966). Taken in combination, these factors lead to the conclusion that the charge may have been coercive and therefore reversible error. (emphasis added) (at page 52).

In United States v. Thomas, 449 F2d 1177 (C.A.D.C., 1971) the court stated:

Moreover, we have had occasion to warn that the Allen charge "approaches the limits to which the court should go in suggesting to jurors the desirability of agreement and avoidance of the necessity of a retrial before another jury. (at page 1182).

The jury is coerced, the Supreme Court held when it is told that "(y)ou have got to reach a decision in this case," and in much the same category is the admonition in this case that "you ought to be able to agree on a verdict." Statements of this sort reflect the judge's assessment that the factual issues bear relatively easy resolution, and pressure jurors, who in their own endeavors have not found it so, to come to some result at all costs.

So also, in somewhat similar fashion, do expressions emphasizing the desirability of achieving a verdict as a means of avoiding the necessity of a retrial. Equally pressuring are statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority. "No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity." (emphasis added) (at pages 1182, 1183).

The charge in the instant case went beyond the American Bar Association Standards Relating to Trial by Jury which provide:

§5.4 Length of Deliberations; deadlocked Jury

(a) Before the jury retires for deliberations, the court may give an instruction which informs the jury:

(i) That in order to return a verdict, each juror must agree thereto;

(ii) That jurors have a duty to consult with one another to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) That each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) That in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) That no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

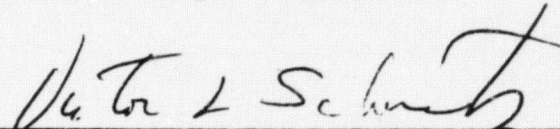
By highlighting the fact that the trial was of short duration; by characterizing the case as "simple;" by advising the minority members to "distrust" their individual opinions; all coup-

led with permissible admonitions of the Allen charge caused the charge taken as a whole to be coercive and tainted the verdict.

CONCLUSION

Accordingly, it is requested that for all of the foregoing reasons, the judgment of sentence of the district court be vacated and that the appellant be granted a new trial.

Respectfully submitted,



Victor L. Schwartz, Esquire
Counsel for the Appellant,
Rudy Lewis

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the within Brief and Appendix were forwarded to Howard R. Staller, Esquire, 450 Seventh Avenue, New York, New York by Greyhound Express who promised to hand deliver the two copies of the Brief and Appendix to Nathaniel Ackerman, Assistant United States Attorney, 1 Saint Andrews Place, New York, NY on or before October 6, 1977.

Victor L. Schwartz

Victor L. Schwartz
Attorney for Appellant

Dated: Oct. 5, 1977

**COURT OF APPEALS
STATE OF
SECOND CIRCUIT**

UNITED STATES OF AMERICA,,

Plaintiff-Appellee,
- against -

DWAN GOLDMAN & RUDY LEWIS,

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 7th day of October, 1977 at 1 St Andrews Plaza
New York, N. Y.

deponent served the annexed

upon

Appendix

Brief

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

U.S. Attorney for Southern District
Robert B. Fiske, Jr.

Sworn to before me, this 7th
day of October, 1977

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

James A. Steele